No. 77-283

In the Supreme Court of the United States

OCTOBER TERM, 1977

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL NO. 13, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Assistant General Counsel,

DAVID S. FISHBACK,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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CITATIONS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 549 F. 2d 1346. An earlier opinion (Pet. App. D) is not officially reported. The decision and order of the National Labor Relations Board (Pet. App. B) is reported at 210 NLRB 952. Earlier decisions of the Board in the same cases are reported at 183 NLRB 221 (Pet. App. C) and 192 NLRB 260 (Pet. App. E).

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1977. On May 20, 1977, the court denied a petition for rehearing (Pet. App. F). The petition for a writ

of certiorari was filed on August 18, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found, in the circumstances of this case, that petitioner violated the National Labor Relations Act by administering a hiring hall in a manner that encouraged union support and discriminated in favor of union members, and by bargaining to impasse over the use of unlawful dispatch criteria.

2. Whether the Board properly ordered petitioner to make whole any job applicants who lost earnings because of petitioner's discriminatory exercise of its dispatch authority.

STATUTORY PROVISIONS INVOLVED

Section 10(c) of the National Labor Relations Act, as amended, 61 Stat. 147, 29 U.S.C. 160(c), provides in relevant part:

> * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint [has committed] * * * any such unfair labor practice, then the Board * * * shall issue * * * an order requiring such person * * * to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him * * *.

Other relevant provisions of the statute appear at Pet. App. G.

STATEMENT

I. The Board's Findings of Fact

The International Longshoremen's and Warehousemen's Union (on behalf of its local unions (including petitioner)) and the Pacific Maritime Association (PMA) (on behalf of its employer members) were parties to a collective bargaining agreement providing for the dispatch of longshoremen through jointly-controlled hiring halls. The Joint Coast Labor Relations Committee, made up equally of International and PMA representatives, was responsible for decisions concerning the operation of the hiring halls (Pet. App. B-6). The hiring halls were administered by dispatchers elected by the International's membership. First preference in dispatch to jobs was given to fully-registered ("Class A") longshoremen; second preference was given to limited-registered ("Class B") workers. When no registered longshoremen were available to fill the jobs, the hiring halls dispatched unregistered men. Only six Class A registrants were not members of the International; Class B registrants and unregistered men generally were not union members (Pet. App. A-7, B-6 to B-7).

The International had a policy requiring applicants for Class B registered status to be sponsored by an eligible Class A registrant. In November 1965 the Joint Coast Committee ordered that the sponsorship requirement be eliminated for future registrations (Pet. App. B-7, B-13, C-8 to C-10, E-4). But in 1967 and 1968, in the course of proceedings before the Los Angeles-Long Beach Joint Port Committee[1] to increase the number of Class B

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[1] Each port had a Joint Port Labor Relations Committee (Pet. App. B-6 to B-7).

longshoremen, petitioner insisted that only applicants who had a sponsor should be considered for Class B status. The parties reached an impasse over petitioner's insistence, and the dispute was submitted to an arbitrator, who ruled on March 10, 1968, that petitioner had violated the collective bargaining agreement by insisting on sponsorship (Pet. App. B-7 to B-8, C-10 to C-12). Following the arbitrator's award, however, petitioner continued to insist on sponsorship, submitting to the Port Committee on October 2, 1968, a list of names for Class B registration which included only people with Class A sponsors (Pet. App. B-8, B-10, B-16, C-11 to C-13).[2]

As of July 15, 1968, under the plan of the Los Angeles-Long Beach Joint Port Committee, Class A and B longshoremen were dispatched from the Central Dispatch Hall, while non-registered longshoremen were given identification cards and dispatched by rotation from the "Dispatch Hall for Extra Longshore Work" (Extra Hall). In September 1968 petitioner unilaterally changed this system by dispatching from other locations (known as "runner locations") persons on strike in other industries. Moreover, petitioner also began, contrary to the Joint Port Committee agreement, to dispatch terminal warehousemen (known as "TW members" of the International)[3] to longshore jobs from the Central Dispatch Hall instead

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[2]In June 1967 James Phillips, a casual longshoreman, completed an application for Class B registration. In February 1969 Phillips inquired of petitioner's Secretary-Treasurer Godfrey about the status of his application. Godfrey asked Phillips if he had a sponsor; when Phillips responded in the negative, Godfrey indicated that, if he wished to achieve Class B status, he would have to secure a sponsor (Pet. App. C-13).

[3]Terminal warehousemen were employed by various warehousing companies and were members of petitioner (Pet. App. C-8).

of from the Extra Hall. In 1969 petitioner increased the number of terminal warehousemen from 41 to 635. In the middle of that year, the number of unregistered workers who did not have union membership and were dispatched from the Extra Hall decreased substantially while the number of terminal warehousemen members dispatched from the Central Hall increased greatly (Pet. App. E-5 to E-7).

In early autumn 1969, the PMA offered a list of applicants for consideration for Class B status; petitioner countered with a proposal that all those on PMA's list who had worked more than 100 hours in longshore jobs in 1969 receive Class B status. PMA rejected this proposal, noting that most of those who had more than 100 hours of longshore experience were TW members who had gained that experience because of improper dispatching by petitioner (Pet. App. E-7).

On October 31, 1969, the Extra Hall was closed, and, thereafter work not assigned to Class A and B longshoremen went only to TW members at the Central Dispatch Hall or to extras at "runner locations." Consequently, most of those dispatches went to TW members as opposed to other unregistered applicants (Pet. App. E-7).

Thereafter, and until February 12, 1970, petitioner continued in its discussions with PMA to insist on either sponsorship for Class B registrants or preferential registration of those with substantial 1969 experience—*i.e.*, TW members. Finally, on February 12, 1970, petitioner's members voted to comply with the arbitration award of March 1968 and to drop the insistence on sponsorship (Pet. App. E-7).

II. The Decisions Below

The Board found that petitioner had prevented registration and dispatch of non-union members in violation of Sections 8(b)(1)(A) and (2) of the Act, 29 U.S.C. 158(b)(1)(A) and (2), by requiring applicants for Class B status to be sponsored by a member or former member with a withdrawal card, by giving preference to its TW members over nonmembers in dispatching unregistered men to longshore jobs, and by attempting to obtain preference in Class B registration for its TW members over nonmembers.[4] The Board further found that by its insistence upon union-member sponsorship or membership for Class B registration, petitioner refused to bargain in good faith in violation of Section 8(b)(3) of the Act. The Board ordered that petitioner, *inter alia*, make whole any applicants for employment for any loss of earnings they may have suffered by reason of petitioner's discriminatory exercise of its dispatch authority.

The court of appeals upheld the Board's decision and enforced its order in full (Pet. App. A). The court rejected petitioner's argument that the events found to be unfair labor practices were time-barred by Section 10(b) of the Act, 29 U.S.C. 160(b).[5] Quoting *Local Lodge No. 1424* v. *National Labor Relations Board*, 362 U.S. 411, the court

[4]The Board decision under review (Pet. App. B-1 to B-4) is a consolidation of two cases (Pet. App. C-1 to C-22 and E-1 to E-16). After the Board petitioned for enforcement of its orders in the two cases, the court of appeals remanded the Board's decision in one case for more detailed findings about "(1) the actual operation of the sponsorship program and (2) the effect of the program" (Pet. App. D-2). The court of appeals granted the Board's motion to withdraw its application for enforcement in the other case to enable the Board to take further evidence in the case consistent with the remand.

[5]Section 10(b) states that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." The charge in one case was filed March 18, 1969; the charge in the other was filed November 3, 1968.

pointed out that, where unfair labor practices occur within the Section 10(b) period, antecedent events may be used to elucidate the character of those events (Pet. App. A-6). And the court noted that petitioner's refusal to consider Phillips for registration (see note 2, *supra*) occurred within the Section 10(b) period (Pet. App. A-6). The court explained that the Union continued to insist on the sponsorship system during the Section 10(b) period and made discriminatory referrals of TW members during that period (Pet. App. A-7, A-9).

The court also rejected petitioner's attack on the Board's remedial order. It stated (Pet. App. A-11):

> The Union argues that the back pay award would be "in the order of several million dollars" and would conceivably destroy the Union. At this stage, the assertion is speculative. Because the compliance stage of the proceedings has not yet been reached, we have no way of knowing the exact amount involved. Moreover, even if the award did reach the total contemplated by the Union, that does not change its nature from remedial to punitive. The Board is simply requiring the Union to reimburse those who lost income as a result of the Union's illegal discrimination. The Board is not ordering that the employees be made more than whole. Thus, the order merely removes the effects of the unfair labor practice by giving those who were its victims what they would have received absent the Union illegal practices.

ARGUMENT

1. Although unions may operate exclusive hiring halls pursuant to collective bargaining agreements with employers (*Local 357, Teamsters* v. *National Labor Relations Board*, 365 U.S. 667), they may not give preference to union members or encourage union membership or support. Preferences or membership encouragement are discrimination prohibited by Sections 8(b)(1)(A) and 8(b)(2) of the Act. *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 31-33, 52. Petitioner does not dispute these settled principles. Rather, petitioner contends that no violations could properly be found here because the record fails to show unlawful discrimination with respect to dispatch or registration of specific applicants (Pet. 20-21) and that, in any event, the charges were time-barred (Pet. 17-19). These assertions raise no issue warranting review by this Court.[6]

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[6]Petitioner also discusses (Pet. 19-20) whether the duty of fair representation extends to non-bargaining unit members. No such question is presented by this case. The collective agreement and the bargaining unit included all longshoremen, including non-registered workers, in the Los Angeles-Long Beach area (Pet. App. B-6 to B-8), and the victims of any discrimination therefore were within the bargaining unit.

Nor, as petitioner contends (Pet. 21), did the Board base its finding of a violation of Section 8(b)(3) on "a history of dozens of meetings, proposals and counterproposals, all dealing with registration of Class B longshoremen, and all culminating in a mutually agreeable registration." The Board found instead that petitioner reiterated its insistence on the unlawful sponsorship system throughout the negotiations until it relented on February 12, 1970 (Pet. App. B-7 to B-8, E-11). Insistence on unlawful terms and conditions of employment by either side in negotiations is a *per se* violation of the duty to bargain in good faith. *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 360 (Harlan, J., concurring); *National Labor Relations Board* v. *Amalgamated Lithographers of America*, 309 F. 2d 31, 42-44 (C.A. 9).

a. The Board need not always show specific instances of discriminatory conduct or intent. The Board need only show that a union adopted a practice, the natural and probable consequence of which is to encourage union membership or support. *Radio Officers' Union, supra,* 347 U.S. at 44-46. Class A members were almost uniformly union members. Because petitioner's insistence on the sponsorship system thus tended to coerce those desiring Class B status to acquire connections with union members, the system required loyalty to and association with petitioner and its members. Moreover, petitioner's insistence upon sponsorship successfully blocked for several years all registration of applicants for Class B registration and allowed the Union to give illegal dispatch preference to its non-registered TW members. This practice resulted in a pattern of unlawful discrimination for members as a group and against nonmembers as a group.[7] The Board found that the Union implemented its program specifically by refusing Phillips' application for Class B registration because it was not supported by a sponsor (see pages 3-5 and note 2, *supra*).

b. Contrary to petitioner's contention (Pet. 17-19), the court of appeals did not adopt a "continuing violation" theory to find that the charges were timely. The court found specific instances of unlawful conduct within the Section 10(b) period and properly considered antecedent events in those circumstances (see pages 6-7, *supra*). This case therefore does not present any question concerning the propriety of a "continuing violation" approach.

2. Petitioner's objection to the Board's order (Pet. 12-15) tracks its argument on the merits: it contends that

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[7]See pages 3-5, *supra*.

a back pay award is inappropriate "without proof of loss by so much as one individual" (Pet. 13). To the extent that petitioner merely complains that the order does not identify particular discriminatees or the amounts owed them, those matters are appropriately left to the compliance stage of the Board proceedings (Pet. App. E-13 n. 25).[8] To the extent that petitioner contends that, as a matter of law, an award cannot be made on behalf of persons who have not complained of the discriminatory practices, this Court has recently rejected a similar contention respecting a pattern of discrimination violating Title VII of the Civil Rights Act of 1964. *International Brotherhood of Teamsters* v. *United States*, No. 75-636, decided May 31, 1977, slip op. 36-40. The Court noted approvingly the practice under the National Labor Relations Act of awarding relief to discriminatees who had made no specific complaint, stating: "The effects of and the injuries suffered from discriminatory employment practices are not always confined to those who were expressly denied a requested employment opportunity. A consistently enforced discriminatory policy can surely deter job applications from those who

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[8]After a Board order has been entered, the appropriate regional office administratively determines compliance issues such as back pay. Where the respondent does not voluntarily accept the Regional Office's determination, the Board invokes administrative procedures, which culminate in a ruling by an administrative law judge on the contested issues. As with unfair labor practice cases, this ruling is reviewed by the Board. See Board's Rules and Regulations, 29 C.F.R. 102.52-102.59; Board's Statements of Procedures, 29 C.F.R. 101.16. Similarly, Board orders arising from compliance proceedings must be enforced by an appropriate federal court under Section 10(e) of the Act, 29 U.S.C. 160(e). See, generally, *National Labor Relations Board* v. *Local 138, International Union of Operating Engineers*, 380 F. 2d 244, 245-246 (C.A. 2).

are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection" (*id.* at 38).

Local 60, United Brotherhood of Carpenters v. *National Labor Relations Board*, 365 U.S. 651, upon which petitioner relies (Pet. 14), is not to the contrary. There the Board, seeking to remedy an unlawful closed shop preferential hiring system, ordered the union (in addition to making whole the employees who were victims of the discrimination) to reimburse all employees for any assessments collected by the union within six months of the filing of the unfair labor practice charge. 122 NLRB 396, 401. The Court pointed out that all of the affected employees were union members before the unlawful activity began and none was shown to have maintained membership because of it; it therefore held that the reimbursement requirement was not remedial. Here, on the other hand, the back pay remedy runs solely in favor of those against whom the union unlawfully discriminated. As the court of appeals stated (Pet. App. A-11): "The Board is simply requiring the Union to reimburse those who lost income as a result of the Union's illegal discrimination."

Finally, petitioner is incorrect in arguing (Pet. 15-16) that back pay is authorized under the Act only as an adjunct to reinstatement. The language of Section 10(c), 29 U.S.C. 160(c), providing for reinstatement with back pay does not, by its terms, limit back pay to situations in which reinstatement is ordered. See *National Labor Relations Board* v. *International Longshoremen's Union*, 378 F. 2d 125, 130 (C.A. 9), certiorari denied, 389 U.S. 846. It would make no sense to say that the Board lacks the power to redress cases in which illegal conduct wholly prevented employment and therefore would make "reinstatement" impossible.

The remedy here is limited to recoupment of income actually lost as a result of the discrimination. In the forthcoming back pay proceeding, petitioner will have the opportunity to show that particular claimants would not have worked even if the dispatch system had been carried out legally. *International Brotherhood of Teamsters* v. *United States, supra.* Petitioner is not entitled to set up the magnitude (and success) of its misconduct as a reason why there should be no relief at all.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Assistant General Counsel,

DAVID S. FISHBACK,
Attorney,
National Labor Relations Board.

OCTOBER 1977.

DOJ-1977-10